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IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 10-0101

CHARLES LOKEY, and VANESSA LOKEY, Appellants, vs. ANDREW J. BREUNER, and A.M. WELLES, INC., Appellees.	)	**APPELLANTS' RESPONSE TO WELLES' MOTION TO DISMISS**

Welles' motion to dismiss requires consideration of six factors and three guiding principles. *Roy v. Niebauer*, 188 Mont. 81, 610 P.2d 1185 (1980). Since Rule 16 limits this brief to 1,250 words, the Lokeys attached copies of their motion for certification and briefs to their notice of appeal, so this Court would have access to the record available to the District Court.

Welles argues that the District Court failed to articulate the factors it relied upon, and explain how they justify an interlocutory appeal. However, while the District Court could have done a better job, that does not require dismissal.

This action arises out of an accident that occurred when a truck driver working for Welles overtook Charles Lokey, who was riding a bicycle, and then stopped and gestured for an oncoming motorist, Andrew Breuner, to turn in front of him. Breuner turned and collided with Lokey, who suffered serious injuries. Lokey and his wife sued Breuner and Welles, alleging:

> The Lokeys' injuries and damages were caused by defendants' negligence, including . . . the Welles truck driver's negligence in gesturing for Breuner to turn when he knew or should have known Charles Lokey was riding alongside his truck and trailer, and Breuner's negligence in making the turn and his failure to yield the right-of-way to Lokey.

Amended Complaint, at ¶ 8.

The District Court dismissed Welles, explaining:

> While it is undoubtedly true that Welles knew Lokey was on a bicycle traveling on the shoulder of the road and had even passed him, Welles was no more responsible for Lokey than he was for any of the other hundreds of drivers on the road. All persons are required to use ordinary care to prevent others from being injured as a result of their conduct, but there is no statute or case law in Montana which requires more of Welles given the facts of this case. There simply is no authority for Lokey's proposition that a driver who courteously yields his right-of-way to a left-turning driver is responsible for determining if all other lanes of traffic are clear of pedestrians or bicycles or whatever may be there. . . .

Order Granting Motion to Dismiss, at 4.

Although the District Court misconstrued the Lokeys' claims against Welles,[1] the result is the same. The District Court dismissed one of two defendants who contributed to cause the accident.

ARGUMENT

Careful consideration of the *Roy* factors supports certification.

1. The Lokeys' claims arise out of different facts.

The Lokeys' claims against Welles and Breuner arise out of the same accident, but different facts. Their claims against Welles are based on its driver's failure to exercise reasonable care in directing traffic.[2] Their claims against Breuner arise out of his failure to exercise reasonable care in turning. These claims arise out of different facts, and the District Court dismissed Welles based on a conclusion of law that has no bearing on the claims against Breuner. This distinction was sufficient to warrant certification in *Noel v. Hall*, 568 F.3d 743 (9th Cir. 2009); *Estate of Metzermacher v. National Railroad Passenger Corp.*, 487 F.Supp.2d 24 (D. Conn. 2007); *McKibben v. Chubb*, 840 F.2d 1525 (10th Cir. 1988); and *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2nd

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[1] The Lokeys never alleged that Welles' driver had a duty to determine whether other lanes were clear, but only that in directing traffic he had a duty to exercise reasonable care.

[2] It is settled law that one who assumes to act, even gratuitously, should exercise reasonable care. *See, e.g., Nelson v. Driscoll*, 1999 MT 193, ¶ 36-40, 295 Mont. 363, 983 P.2d 972.

Cir. 2005) (approving certification after the district court dismissed all but one defendant because "[t]his is precisely the type of danger or hardship or injustice . . . to which Rule 54(b) is directed").

Although this Court has not addressed the dismissal of one of two parties who contributed to cause an accident, it has stated that an order dismissing some but fewer than all parties in a case involving multiple parties may be certified as final for purposes of appeal. *Weinstein v. Univ. of Montana*, 271 Mont. 435, 441, 898 P.2d 101, 105 (1995).

Welles cites *Weinstein* for the proposition that different claims arising out of the same accident should be treated as a single claim. However, Welles misconstrues *Weinstein*. In *Weinstein*, a former employee sued the University for breach of contract, and sued university officials for tortious interference, but alleged the *same facts* in each count. *Id.*, 271 Mont. at 442, 898 P.2d at 105. This case is distinguishable. The Lokeys' claims against Welles and Breuner arise out of different facts, and while alternative theories of recovery based on the same facts may be treated as a single claim, that rule has no application here.

Moreover, in *Weinstein*, the University was vicariously liable for the conduct of its officials. Not so here. When this case goes to trial, the District Court will instruct the jury to determine the percentage of liability attributable to each party and apportion damages accordingly, but the jury will only be given two

choices, instead of three, and that will force Breuner to pay, or prevent the Lokeys from recovering, any damages attributable to the negligence of Welles' driver.

2. Future developments will not moot the need for review.

The only development that could moot the need for appellate review is a jury verdict that Breuner is 100% at fault for the accident, but given the District Court's pronouncement that "Lokey violated § 61-8-324," that is unlikely. Order Denying Defendant's Motion for Summary Judgment, at 2. Having found Lokey negligent as a matter of law, the District Court acknowledged that future developments are unlikely to moot the need for appellate review.

Welles speculates about a "multitude of outcomes" that might moot the need for review. However, it is not the number of theoretical outcomes that matters, but the possibility that forcing this case to trial without Welles might moot the need for appellate review, and that is unlikely.

3. This Court will not have to consider the issue again.

The issue – whether one who assumes responsibility for directing traffic has a duty to exercise reasonable care – requires appellate review only once.

4. There are no counter-claims that could result in a set-off.

Breuner and Welles never asserted any counter-claims.

5. Miscellaneous factors.

This Court has identified several miscellaneous factors to be considered.

Roy, 188 Mont. at 87, 610 P.2d at 1189. However, Rule 16 prevents the Lokeys from addressing them in this brief. For a full discussion, see their motion for certification, copy attached to their notice of appeal.

6. This is the "infrequent harsh case."

It makes no sense to force the Lokeys and Breuner to proceed to trial without Welles. A jury could reasonably conclude that Welles' driver contributed to cause the accident, but the dismissal of Welles will prevent the jury from apportioning liability accordingly. Appellate review will ensure that Breuner does not have to pay, or the Lokeys go without, compensation for damages attributable to the truck driver's negligence in directing traffic, and appellate review at this juncture will best serve the needs of the parties and the interests of sound judicial administration and public policy.

7. Conclusion.

Careful consideration of the *Roy* factors compels appellate review at this juncture. The Lokeys' claims against Welles and Breuner arise out of different facts; future developments will not moot the need for review; this Court will not have to consider the issue again; there are no counter-claims; the miscellaneous factors support review at this juncture; and there is no just reason for delay. This is the "infrequent harsh case" warranting interlocutory appellate review.

DATED this 19 day of March, 2010.

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